SUPREME COURT, U. S.

No. 73-1107

FILED
FEB 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

BERNARD ROSEN, EXECUTIVE DIRECTOR,
UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,
Petitioners,

v.

ROBERT G. VAUGHN,
Respondent.

On Petition for a Writ of Certiorari
to The United States Court of Appeals
for The District of Columbia Circuit

BRIEF FOR RESPONDENT ROBERT G. VAUGHN IN OPPOSITION

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This brief is submitted by respondent Robert G. Vaughn in opposition to the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Vaughn v. Rosen*, 484 F.2d 820

(1973) (App. 1a-18a).[1] Since the petition neither presents questions of the type set forth in Rule 19 of this Court, nor otherwise presents special or important reasons for granting it, this Court should deny the writ and permit respondent to proceed with this action in the district court.

QUESTION PRESENTED

Did the court of appeals properly require the defendants in this and other similar Freedom of Information Act cases to justify their withholding of documents by specific showings that permit an adversary testing of their contentions, rather than by generalized, conclusory, and in some cases, internally-contradictory statements of exemption from disclosure?

STATEMENT OF THE CASE

The United States Civil Service Commission has the overall responsibility and authority in the Federal Government to evaluate, oversee, and regulate the personnel management activities of the various Federal agencies. Executive Order 9830 (February 24, 1947). The Commission's Bureau of Personnel Management Evaluation periodically assesses the personnel policies of individual Federal agencies and prepares reports which contain recommendations and policies for adoption by both the agency and the Commission. These reports do not merely discuss how particular employees fulfill particular jobs, but, taken as a whole, give a detailed picture of how the Government operates. It is these personnel management evaluation reports for the

[1] References to the Appendices submitted by petitioners will be to the consecutively numbered pages, preceeded by "App.".

fiscal years 1969-72, as well as special studies of the Commission compiled during that time on various personnel problems, such as equal employment and employee discipline procedures, which are sought by respondent.

In the district court petitioners claimed that three separate exemptions entitled them to withhold the requested reports, and they submitted two affidavits to support their motion for summary judgment on these grounds. The affidavit of petitioner Bernard Rosen, Executive Director of the Civil Service Commission, merely recited the chronology of respondent's request and the Commission's denial of access (VJA 17-19).[2] The other affidavit was that of Gilbert A. Schulkind (VJA 10-16), Director of the Bureau of Personnel Management Evaluation, and it described in general terms the process by which the Personnel Management Evaluation Reports are compiled and alleges that certain harms would result from release of the reports. Petitioners' statement of material facts which they claimed were not in dispute,[3] also contained no more than a chronology and a repetition of the reasons for the denial of respondent's request. In response, respondent filed a statement in opposition which set forth additional facts concerning the purpose for, and preparation of, the sought-after reports and annexed a copy of an article written by Mr. Schulkind which considerably amplified the matters set forth in his supporting affidavit (VJA 24-26). Also attached was a memorandum of October 9, 1969, from the President to all Heads of Executive

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[2] References to the Joint Appendix submitted in the court of appeals will be "VJA ____."

[3] As required by Local Rule 9(h), United States District Court for the District of Columbia, now appearing substantially unchanged as Rule 1-9(g).

Departments and Agencies explaining the role of the Civil Service Commission in the evaluation of personnel management programs, a role which includes the preparation of the reports at issue here (VJA 27-32). In reply, Mr. Schulkind submitted another affidavit which disputed certain facts presented by respondent, although conceding that the resolution of those factual differences was "immaterial and irrelevant" (VJA 22-23). It was in this posture that the matter was presented to the district court on cross-motions for summary judgment. Three days later, without benefit of oral argument or *in camera* inspection as suggested by respondent, the district court entered an order dismissing the complaint with no explanation of the reasons for dismissal, or even a statement as to which of the claimed exemptions was applicable.

The court of appeals remanded, stating that "the scant record makes it impossible to determine if the information sought by appellant is indeed exempt from disclosure; . . ." (App. 4a). It recognized that the person seeking access could not be expected to supply the necessary facts because the documents sought were themselves secret, and stated that, in any event, it is the Government which has the burden of justifying secrecy. It acknowledged that the district court might ascertain the facts in some cases through *in camera* inspection, but pointed out that the process would be extremely burdensome on the court, and "is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure." (App. 10a). It concluded that because the Government officials who possess the documents are in the best position to present a full description of them and of the reasons for withholding access, it would require that defendants in Freedom of Information cases provide a complete justification for their actions.

In an effort to avoid "conclusory and generalized allegations of exemptions, such as the trial court was treated to in this case," the court of appeals stated that on remand the Government should submit "a relatively detailed analysis in manageable segments." (App. 14a, footnotes omitted). In order to assure that there was an adequate testing of the Government's claim to an exemption, the court required that there be a separation of the exempt portions from those which are disclosable, a result that "could be achieved by formulating a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document." (App. 15a). Having spelled out the kinds of supporting materials which the Government would need to sustain its claims, the court concluded that "a more adequate adversary testing will be produced" (App. 17a), thereby according the requesting party the opportunity to refute the Government's contentions. Even this, the court recognized, might not be a panacea for handling some "extremely burdensome" cases, and so it reminded the district courts of the option of utilizing a special master to "assist the adversary process" *id.*, as contemplated by Rule 53, F.R.C.P.

Petitioners claim that these procedures, which the court of appeals mandated as a means to assist it and the district court in resolving Freedom of Information Act cases, "attempt to control the way in which the government should conduct its litigation" (Pet. 11), and for this reason they seek review in this Court. Respondent submits that the elaboration by the court of appeals of the method by which the Government must meet its burden of proof in Freedom of Information Act cases was entirely proper and that there is no reason for this Court to review this matter at this time.

ARGUMENT

THE DECISION OF THE COURT BELOW WAS CORRECT AND THERE IS NO CAUSE FOR REVIEW BY THIS COURT.

Petitioners urge this Court to review the decision of the court of appeals because it erroneously interpreted the Freedom of Information Act and because it was "[c]ontrary to the decision of this Court in *Environmental Protection Agency v. Mink*, [410 U.S. 73 (1973)] . . . ." (Pet. 9). As we shall demonstrate, neither of those reasons is correct, and since petitioners have not otherwise satisfied the requirements of Rule 19 of this Court, the petition should be denied.

At the outset it is necessary to put the problem which the court of appeals faced in perspective. According to petitioners' own figures (Pet. 9), more than half the Freedom of Information cases pending as of November 1, 1973, had been brought in the United States District Court for the District of Columbia. In many of the cases which reached the court of appeals, it had to remand for further factual determinations because there were insufficient facts in the record to make an adjudication of whether there was a justification under the statute for withholding the documents.[4] The dilemma of the court of appeals in this case is typical of the problem faced at both the trial and appellate court levels in many of these cases.

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[4] Among the cases in which the court of appeals remanded for further factual determinations are the following: *Fisher v. Renegotiation Board*, 473 F.2d 109 (1972); *Soucie v. David*, 448 F.2d 1067 (1971); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (1971); *Bristol-Myers Co. v. F.T.C.*, 424 F.2d 935, *cert. denied*, 400 U.S. 824 (1970); and *Ackerly v. Ley*, 420 F.2d 1336 (1969).

All that the court of appeals did here was to set forth general standards that a defendant in a Freedom of Information Act case must meet in order to satisfy its statutory burden of sustaining a denial of access.[5] It simply sought to spell out in greater detail than had been provided in the Act or in prior cases, the kind of proof that would suffice to meet this burden. Given the number of these cases handled by this court of appeals, and the problems that it had experienced in resolving them properly under the inadequate records provided to support a claim of one or more exemptions, the court was fully justified, as a matter of judicial administration, in establishing these guidelines.

The procedures are entirely consistent with the requirements outlined by this Court in *Environmental Protection Agency v. Mink*, 410 U.S. 73, 93 (1973):

> An agency should be given the opportunity, by means of *detailed affidavits or oral testimony*, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a party in litigation with the agency. (Emphasis supplied).

The court of appeals did no more than elaborate on the contents of the "detailed affidavits" which are required in most cases under the Freedom of Information Act.[6]

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[5] See 5 U.S.C. § 552(a)(3) (1970), App. 46a (" . . . the burden is on the agency to sustain its action.")

[6] There are some cases that do not require the type of showing outlined by the court of appeals. An example would be where the form and general content of the withheld document is known, and where the document is allegedly exempt under 5 U.S.C. § 552(b)(3) as a matter "specifically exempted by statute."

Constantly faced with the problem of incomplete records in these cases, the court acted to resolve it. As Chief Judge Bazelon pointed out in his concurrence in *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), in which certiorari is also sought, the *Vaughn* procedural requirements are "like much in the law, an experiment to be tried by experience." (A. 33a). The court's attempt to solve these problems is consistent with its prior decisions, with the decisions of this Court, and with the letter and spirit of the Freedom of Information Act. The desire of the Government to "control the way in which [it] should conduct its litigation" (Pet. 11) was properly reconciled with the rights of citizens to obtain access to agency records as permitted by law, and to the right of the courts to administer justice effectively at the district and appellate court levels. Nothing in *Vaughn* in any way exceeded the bounds of proper judicial administration. Rather, the opinion of Judge Wilkey is an emminently sensible and practical one which should gain widespread acceptance in the handling of Freedom of Information cases. There is no cause for this Court to review that determination, especially in light of the fact that the court of appeals in both this case and *Cuneo v. Schlesinger, supra*, declined to rehear the question *en banc* as suggested by the Government. It may be that review might be appropriate in the light of experience gained in employing these procedures, but now is surely not an appropriate time for this Court to concern itself with matters such as these in which the District of Columbia Circuit is so experienced.

Finally, petitioners claim (Pet. 12) that the suggestion of the court of appeals that special masters may be used in the discretion of the district court judge is contrary to Rule 53(b), F.R.C.P., and to *LaBuy v. Howes Leather Co.*,

352 U.S. 249 (1957). However, neither of these authorities prohibits the use of special masters. Both of them permit the district court discretion in exceptional cases to refer certain matters to a special master, even over the objection of the parties.[7] The court of appeals simply reminded the district court that the circumstances of some Freedom of Information Act cases might present an appropriate occasion for such a reference. For the present, there is no more than a possibility of such reference at some time in the future, and hence there is simply no present need to review the decision of the court of appeals at this point.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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February 14, 1974

[7] See Rule 53(e)(4), "The effect of a master's report is the same whether or not the parties have consented to the reference; . . ."